

# **CRIMINAL PROCEDURE LAW SECTION 30.30 (1) MANUAL**

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➤ **IN GENERAL:** Criminal Procedure Law § 30.30, also known as “statutory speedy trial,” requires the prosecution to establish its readiness for trial on an “offense” within a specific codified time period after the commencement of a criminal action (which occurs, generally, by the filing of the initial accusatory). If the prosecution is not ready for trial within the time required, the defendant may be entitled to dismissal of the accusatory instrument, pursuant to CPL 30.30 (1), or release pending trial, pursuant to CPL 30.30 (2). The statute excludes certain designated periods from the time calculation.

o **Rights Afforded**

- This statute does not afford the defendant the right to a “speedy trial.” That right is provided by CPL 30.20, the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section Six (the due process clause) of the New York State Constitution. (See *United States v Tigano*, 880 F3d 602 [2d Cir 2018]; *People v Wiggins*, 31 NY3d 1 [2018]; *People v Singer*, 44 NY2d 241 [1978]; *People v Portorreal*, 28 Misc 3d 388 [Crim Ct, Queens County 2010].)
- The statute does not require the People to speedily *commence* a criminal action (i.e., file an accusatory) after the commission of a crime (*People v Faulkner*, 36 AD3d 1009 [3d Dept 2007]).
- A defendant’s rights under this statute are not dependent in any way on whether he or she is ready for trial (*People v Hall*, 213 AD2d 558 [2d Dept 1995]).

o **Interpreting CPL 30.30**

- In determining whether a defendant’s 30.30 rights have been violated, one must look to the statute’s provisions, as well as case law interpreting the provisions (see e.g. *People v Parris*, 79 NY2d 69 [1992]; *People v Sturgis*, 38 NY2d 625 [1976]).

o **Scope**

- **Offense Requirement:** An accusatory is subject to dismissal pursuant to CPL 30.30 (1) only if it charges an “offense” that is a “violation,” “misdemeanor,” or “felony.”
  - An “offense” is “conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of [New York], or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same” (Penal Law § 10.00 [1]).
- **Traffic infractions:** 30.30 does not apply to accusatory instruments charging only a traffic infraction, as defined by Penal Law § 10.00 (2) and Vehicle and Traffic Law § 155 (*see People v Pilewski*, 173 Misc 2d 800 [Just Ct 1997]). This is because a traffic infraction is not a “violation.” A violation is defined as an “offense *other than a traffic infraction*, for which a term of imprisonment in excess of fifteen days cannot be imposed” or “the only sentence provided therein is a fine” (Penal Law §§ 10.00 [3], 55.10 [3] [a] [emphasis added]).
  - However, it has been held that a traffic infraction will be subject to dismissal where the People dismiss a misdemeanor charge and proceed against the defendant on a traffic infraction for the sole purpose of circumventing the defendant’s 30.30 rights (*People v Faison*, 171 Misc 2d 68 [Crim Ct 1996]).
- **Municipal ordinances:** A breach of a municipal ordinance may constitute “violation” “offense,” even where punishable only by fine (*People v Lewin*, 8 Misc 3d 99 [App Term 2005]). Penal Law § 10.00 (1) defines an “offense” in part as “conduct for which a sentence to a . . . fine is provided by any . . . ordinance of a political subdivision of this state . . . .” Penal Law § 55.10 (3) defines a “violation” to include an offense not defined by the Penal Law for which “the only sentence provided therein is a fine.” Trial level courts writing on the issue are split as to whether a violation of a municipal ordinance for which no imprisonment may be imposed may be subject to 30.30 dismissal

(see *People v Kleber*, 168 Misc 2d 824 [Muttontown Justice Court 1996] [concluding that ordinances imposing only a fine are not subject to CPL 30.30 dismissal]; *People v Vancol*, 166 Misc 2d 93 [Westbury Justice Court 1995] [determining that all ordinances are subject to CPL 30.30]; *People v Olsen*, 37 Misc 3d 862 [Massapequa Park Justice Ct. 2012] [observing, in footnote, analytical error in *Kleber* decision]).

- **Homicide Exception:** Pursuant to 30.30 (3) (a), 30.30 (1) is not applicable where the defendant is charged with murder in the first degree (Penal Law § 125.27), murder in the second degree (Penal Law § 125.25), aggravated murder (Penal Law § 125.26), manslaughter in the first degree (Penal Law § 125.20), manslaughter in the second degree (Penal Law § 125.15), or criminally negligent homicide (Penal Law § 125.10). It should be noted that if the defendant is not charged with any of these particular homicide offenses and is instead charged with aggravated manslaughter in the first or second degree (Penal Law §§ 125.22, 125.21), aggravated criminally negligent homicide, (Penal Law § 125.11), or any vehicular manslaughter offense (Penal Law §§ 125.12, 125.13, 125.14), the accusatory may be subject to dismissal pursuant to CPL 30.30 (1).
  - **Non-homicide charges that are joined:** The homicide exception applies even if a non-homicide charge is joined (*People v Ortiz*, 209 AD2d 332, 334 [1st Dept 1994]).
  - **Severance:** A defendant is not entitled to severance of non-homicide counts for the purposes of subjecting the non-homicide counts to 30.30 dismissal (*People v Ortiz*, 209 AD2d at 334). And it has been held that the homicide exception applies to non-homicide charges severed from homicide charges on the theory that "there can be only one criminal action for each set of criminal charges brought against a particular defendant" (*People v Steele*, 165 Misc 2d 283 [Sup Ct 1995]; see also *People v Lomax*, 50 NY2d 351 [1980]).

- **Attempted homicides:** The homicide exception does not apply to the mere attempt to commit any of the enumerated homicides (*see People v Ricart*, 153 AD3d 421 [1st Dept 2017]; *People v Smith*, 155 AD3d 977 [2d Dept 2017]).
- **Dismissal or reduction of homicide charges:** Courts have not yet resolved whether 30.30 (3) (a) is applicable to non-homicide charges in a criminal action in which the defendant initially faced both homicide and non-homicide charges and the homicide charge is later dismissed outright or reduced to a non-homicide charge. However, courts have held that in the 30.30 context, there can be just one criminal action for each set of charges brought against a defendant and that, generally, the rights that apply are those applicable to the highest level offense ever charged in the criminal action (*Lomax*, 50 NY2d 351; *People v Cooper*, 98 NY2d 541 [2002]; *People v Tychanski*, 78 NY2d 909 [1991]).

➤ **TIME PERIODS**

- **In General:** With limited statutory exception, the time period within which the prosecution must be ready for trial is determined by the *highest* level offense ever charged against the defendant in the criminal action (*see* CPL 30.30 [1] [a], [b], [c]; *Cooper*, 98 NY2d 541; *People v Tychanski*, 78 NY2d 909 [1991]).
  - **Felony:** When the highest level offense ever charged is a felony, the prosecution must establish its readiness within six months (which is not necessarily 180 days) of the commencement of the criminal action (*see e.g. People v Cox*, 161 AD3d 1100, 1100 [2d Dept 2018]).
  - **“A” misdemeanor:** When it is an “A” misdemeanor, the prosecution must demonstrate that it is ready within 90 days.
  - **“B” Misdemeanor:** With respect to criminal prosecutions in which the highest offense ever charged is a “B” misdemeanor, the prosecution must establish its readiness within 60 days.

- **Violations:** And when the highest offense ever charged is just a violation, the prosecution must demonstrate its readiness for trial within 30 days.
- **Multi-Count accusatory instruments:** With respect to multi-count accusatory instruments, the controlling time period is the one applying to the top count (*Cooper*, 98 NY2d at 543).
- **Multiple accusatory instruments:** Where the criminal action results in multiple accusatory instruments, the general rule is that the applicable time period is the one that applies to the highest level offense ever charged (*People v Tychanski*, 78 NY2d 909 [1991]). Exceptions to this general rule exist under CPL 30.30 (5) (c), (d), and (e).
- **Reduced charges:** Although there are statutory exceptions (see below), generally speaking, the most serious charge ever brought against the defendant determines which time period applies, regardless of whether that charge is ultimately reduced (*Cooper*, 98 NY2d 541; *People v Tychanski*, 78 NY2d 909 [1991]; *People v Cooper*, 90 NY2d 292 [1997]).
  - **Examples:** Where an A misdemeanor is reduced to a B misdemeanor, the 90 day period applies (*Cooper*, 98 NY2d 541). Where a felony complaint is later superseded by a misdemeanor indictment, the six month period applies (*People v. Tychanski*, 78 NY2d 909 [1991]).
  - **Statutory Exceptions:**
    - **Where a felony complaint has been replaced by, or converted to, a misdemeanor complaint or misdemeanor information (and not a misdemeanor indictment):** Unless otherwise provided, the applicable time period is the one applying to the highest level offense charged in the new accusatory (CPL 30.30 [5] [c]).
      - **Inapplicability of exception:** This exception does not apply if “the aggregate of [the period applicable to the new accusatory instrument] and the period of time, excluding periods provided in [30.30 (4)],

already elapsed from the date of the filing of the felony complaint to the date of the filing of the new accusatory instrument exceeds six months.” In such circumstances, the original, six month time period applies (CPL 30.30 [5] [c]).

- **Where felony count of the indictment has been reduced to a petty offense on legal insufficiency grounds and as a result, a reduced indictment or prosecutor’s information has been filed:** Unless otherwise provided, the applicable time period is the one applying to the highest level offense charged in the new accusatory (CPL 30.30 [5] [e]).
  - **Inapplicability of exception:** This exception does not apply if the period of time between the filing of the indictment and the filing of the new accusatory (less any 30.30 [4] excludable time) plus the period applicable to the highest level offense charged in the new accusatory exceeds six months. If that period does exceed six months, then the time period applicable remains six months (CPL 30.30 [5] [e]).
  - **Increased charges:** Where the original charge is subsequently elevated to a more serious charge, the applicable time period is the one applying to the more serious charge (*Cooper*, 90 NY2d 292).
  - **Calculating time period**
    - **Whether to count day the criminal action commenced:**
      - **Where the prosecution must be ready within 90, 60, or 30 days:** To determine the date by which the People must be ready when the time period is being measured by *days* (where the highest level offense charged is a misdemeanor or violation), the day on which the action commenced is to be *excluded* from the time calculation (*People v Stirrup*, 91 NY2d 434, 438 n 2 [1998]; *People v Page*, 240 AD2d 765 [2d Dept 1997]). For example, in a case in which the criminal action commenced on January 1<sup>st</sup> with the filing

of a complaint charging only a violation, the first day counted in the calculation is January 2<sup>nd</sup> and the prosecution must be ready by the end of the 30<sup>th</sup> day, which is January 31<sup>st</sup>.

- **Where the prosecution must be ready within six months:** Where the time period is to be measured in terms of months (when the highest level offense charged is a felony), the day the criminal action commenced is not excluded from the calculation. For example, where the criminal action commenced with the filing of a felony complaint on July 19<sup>th</sup>, the prosecution must be ready by end of the day on January 19<sup>th</sup> (*see People v Goss*, 87 NY2d 792, 793-794 [1996]).
- **Expiration date falling on a non-business day:** The Third Department has extended the People's time to establish their readiness to the next business day where the expiration date falls on the weekend or a holiday (*see People v Mandela*, 142 AD3d 81 [3d Dept 2016]; *see also People v Powell*, 179 Misc 2d 1047 [App Term 1999]).
- **Six month time period measured in calendar months:** Where six months is the applicable time period (where the highest level offense charged is a felony), the period is computed in terms of calendar months and, thus, the applicable felony time period may be longer than 180 days (*People v Delacruz*, 241 AD2d 328 [1st Dept 1997]).

## ➤ COMMENCING THE 30.30 CLOCK

- o **Commencement of criminal action:** The time period starts when the criminal action has commenced.
  - **General rule:** It is the general rule that the criminal action is deemed to commence with the filing of the *very first* accusatory instrument (*People v Stiles*, 70 NY2d 765 [1987]; *People v Sinistaj*, 67 NY2d 236 [1986]; *People v Brown*, 23 AD3d 703 [3d Dept 2005]; *People v Dearstyne*, 215 AD2d 864 [3d Dept 1995]; *see* CPL 1.20 [17] [defining commencement of the

criminal action as the filing of the first accusatory]).

- **Dismissal of original charges:** Unless otherwise provided, this rule governs even if the original charges are dismissed (*People v Osgood*, 52 NY2d 37 [1980]).
- **Superseding accusatory:** Unless otherwise provided, this rule applies even if the original accusatory is “superseded” by a new accusatory (*People v Sanasie*, 238 AD2d 186 [1st Dept 1997]).
- **Different charges:** Unless otherwise provided, this rule applies even if the new charges replacing the old charges allege a different crime, so long as the new accusatory directly derives from the incident charged in the initial accusatory. Once a criminal action commences, the action includes the filing of any new accusatory instrument directly deriving from the initial one. (CPL 1.20 [16]; *People v Farkas*, 16 NY3d 190 [2011]; see *People v Chetrick*, 255 AD2d 392 [2d Dept 1998] [acts “so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident”]; see also *People v Nelson*, 68 AD3d 1252 [3d Dept 2009] [“To the extent that ‘the felony complaint and subsequently filed indictment allege[d] separate and distinct criminal transactions, the speedy trial time clock commence[d] to run upon the filing of the indictment with respect to the new charges”]; *People v Bigwarfe*, 128 AD3d 1170 [3d Dept 2015] [counts two and three of the superseding indictment should not be dismissed as they allege a separate and distinct drug transaction from the one alleged in the felony complaint; count one, however, was required to be dismissed as it did directly derive from the felony complaint].)
- **Jurisdictionally defective accusatory:** Unless otherwise provided, this rule governs even if the first accusatory is jurisdictionally defective (*People v Reyes*, 24 Misc 3d 51 [App Term 2009]).

- **Sealed indictment:** Unless otherwise provided, the filing of a sealed indictment, as the first accusatory, commences the criminal action.
  - **Statutory exceptions to the first accusatory instrument rule:**
    - **Appearance ticket:** If the defendant has been issued an appearance ticket, the criminal action is said to commence when the defendant first appears in court, not when the accusatory instrument is filed (CPL 30.30 [5] [b]; *Parris*, 79 NY2d 69).
      - **Incarceration:** The date that the defendant first appears in court controls, regardless of whether the defendant is detained on an unrelated charge and was consequently unable to appear in court on the date specified on the appearance ticket or whether the prosecution failed to exercise due diligence to locate the incarcerated defendant (*Parris*, 79 NY2d 69).
      - **No accusatory filed:** The date the defendant first appears in court controls, even if no accusatory instrument is filed at the time of the defendant’s first court appearance (*Stirrup*, 91 NY2d 434).
      - **No judge:** The date the defendant first appears in court is determinative regardless of whether he actually appears before a judge (*Stirrup*, 91 NY2d 434).
      - **Appearance ticket issued by judge in lieu of a bench warrant:** Where a judge directs that an “appearance ticket” be issued upon a defendant’s failure to appear in court, in lieu of a bench warrant, the notice to appear should not be deemed an appearance ticket for 30.30 purposes, as an appearance ticket is defined by the CPL as a notice to appear issued by a law *enforcement officer*, not a judge, and *before*, not after, the accusatory has been filed (CPL 1.20 [26], 150.10). Thus, where the judge directs that an appearance ticket be filed to secure the defendant’s presence upon his failure to appear in court as previously

scheduled, the criminal action will be deemed to have commenced with the filing of the initial accusatory, not upon the defendant's appearance on the judicially directed "appearance ticket."

- **Simplified traffic informations:** It has been held that a simplified traffic information does not commence a criminal action for 30.30 purposes. The rationale is that since 30.30 is not applicable to traffic violations, an information charging only traffic infractions cannot be said to commence a criminal action that later charges the defendant, by way of a subsequent information, with a misdemeanor or felony (*People v May*, 29 Misc 3d 1 [App Term 2010]).
- **Felony complaint converted to an information, prosecutor's information, or misdemeanor complaint:** The criminal action (i.e., 30.30 clock) commences with the filing of the new accusatory, with the applicable time period being that which applies to the most serious offense charged in the new accusatory (CPL 30.30 [5] [c]).
  - **Inapplicability of exception.** This is true unless "the aggregate of [the period applicable to the new accusatory instrument] and the period of time, excluding periods provided in [30.30 (4)], already elapsed from the date of the filing of the felony complaint to the date of the filing of the new accusatory instrument exceeds six months." Under such circumstances, the criminal action commences with the filing of the felony complaint and the six month time period applies (CPL 30.30 [5] [c]).
  - **Misdemeanor indictments:** Where a felony complaint is later superseded by a misdemeanor *indictment*, the criminal action is deemed to commence with the filing of the felony complaint and the six month period continues to apply (*People v Tychanski*, 78 NY2d 909 [1991]).

- **Felony indictment reduced to a misdemeanor or petty offense, resulting in a reduced indictment or misdemeanor information being filed:** A criminal action commences with the filing of the new accusatory, with the applicable time being that applying to the most serious offense charged in the new accusatory (CPL 30.30 [5] [e]).
  - **Inapplicability of exception:** This rule applies unless the period of time between the filing of the indictment and the filing of the new accusatory (less any excludable time [*see* 30.30 (4)]) plus the period applicable to the highest level offense charged in the new accusatory exceeds six months. If that period does exceed six months, then the criminal action will be deemed to have commenced as if the new accusatory had not been filed (typically with the filing of the first accusatory) and the period applicable is that which applies to the indicted (felony) charges, i.e., six months (CPL 30.30 [5] [e]).
  
- **Withdrawn guilty pleas:** Clock commences when the guilty plea is withdrawn (CPL 30.30 [5] [a]).
  
- **Withdrawn pleas of not responsible by reason of mental disease or defect:** Time period commences upon withdrawal of plea (*People v Davis*, 195 AD2d 1 [1st Dept 1994]).
  
- **New trial ordered:** When a new trial has been ordered, the time period begins when the order has become final (CPL 30.30 [5] [a]; *People v Wilson*, 86 NY2d 753 [1995]; *People v Wells*, 24 NY3d 971 [2014]).
  - **Motion for reargument:** Where the prosecution has moved for reargument of an appeal it has lost, the order of the appellate court directing a new trial becomes final when the appellate court has denied the prosecution's motion (*People v Blancero*, 289 AD2d 501 [2d Dept 2001]).

- **Pre-order delay:** Periods of delay occurring prior to the new trial order are not part of the computations (*People v Wilson*, 269 AD2d 180 [1st Dept 2000]).
- **Proving when an accusatory was filed:** The time stated on arrest warrant indicating when the original complaint was filed is generally sufficient proof of when the original complaint was filed (*People v Bonner*, 244 AD2d 347 [2d Dept 1997]).
- **Indictment deriving from multiple felony complaints filed on different days and involving separate incidents:** Where different counts of an indictment derive from different felony complaints filed on separate days and involving distinct incidents, there will be multiple criminal actions having distinct time periods. Counts deriving from such separate felony complaints must be analyzed separately, possibly resulting in the dismissal of some but not all counts of an indictment (*People v Bigwarfe*, 128 AD3d 1170 [3d Dept 2015]; *People v Sant*, 120 AD3d 517 [2d Dept 2014]).

#### ➤ ESTABLISHING READINESS

- **Announcement of readiness:** The prosecution will be deemed ready for trial only if it has announced it is ready – either in open court with counsel present or by written notice to defense counsel and the court clerk (*People v Kendzia*, 64 NY2d 331, 337 [1985]).
  - **On-the-record:** Off-the-record assertions of readiness are insufficient (*Kendzia*, 64 NY2d at 337).
    - **Recorded:** This means that in-court assertions of readiness must be recorded by either the court reporter or the court clerk (*Kendzia*, 64 NY2d at 337).
  - **Present readiness:** Statement must be of present readiness, not future readiness. A prosecutor’s assertion, "I’ll be ready next Monday," for example, is invalid. (*Kendzia*, 64 NY2d at 337)
  - **Contemporaneous:** The assertion of readiness must be contemporaneous with readiness. It is insufficient for the prosecution to assert for the first time in an affirmation in

opposition to a 30.30 motion that it was ready for trial on an earlier date (*Kendzia*, 64 NY2d at 337, *People v Hamilton*, 46 NY2d 932, 933 [1979]).

- **Court congestion:** Delays caused by pre-readiness court congestion do not excuse the prosecution from timely declaring its readiness for trial (*People v Chavis*, 91 NY2d 500 [1998]).
- **Defendant's presence in court:** The defendant need not be present for the statement of readiness to be effective (*People v Carter*, 91 NY2d 795 [1998]).
- **New accusatory:** Where a new accusatory has been filed, following the dismissal of the original accusatory, the prosecution is required to announce its readiness upon the filing of the new accusatory, irrespective of whether it announced its readiness with respect to the original accusatory (*People v Cortes*, 80 NY2d 201, 214-215 [1992]).
- **New trial ordered:** When a new trial has been ordered, the prosecution cannot be ready until it has re-announced their readiness (*People v Wilson*, 86 NY2d 753 [1995]; *People v Dushain*, 247 AD2d 234 [1st Dept 1998]).
- **Off-calendar statement of readiness (a.k.a. *Kendzia* letter):** To be effective, the written statement of readiness must be filed with the court clerk within the statutory period and served on the defendant “promptly” thereafter (*Chavis*, 91 NY2d at 506; *People v Smith*, 82 NY2d 676, 678 [1993]).
  - **Proper service:**
    - **Service of declaration of readiness after expiration of time period:** It has been held that the prosecution is not required to have served the statement of readiness within the statutory period so long as service takes place “promptly” after a timely filing of the statement of readiness (*see People v Freeman*, 38 AD3d 1253 [4th Dept 2007]).

- o **Service on former counsel:** Service of statement of readiness on defendant's former counsel found to be ineffective (*People v Chu Zhu*, 171 Misc 2d 298 [Sup Ct 1997], *revd on other grounds*, 245 AD2d 296 [2d Dept 1997]).
- o **Service on counsel at wrong address:** A court has found service of statement of readiness on counsel at incorrect address may still be effective if the People "did not have actual notice that the address was incorrect prior to service of the" statement of readiness (*People v Tejada*, 59 Misc 3d 422, 424 [Crim Ct, Bronx County 2018]).
- o **Actual readiness:** The prosecution must be actually ready for trial for its announcement of readiness to be effective (*People v Brown*, 28 NY3d 392 [2016]).
  - **Readiness defined:** The prosecution will be deemed ready where it has done all that is required of it to bring the case to a point where it can be tried "immediately" (*People v Robinson*, 171 AD2d 475, 477 [1st Dept 1991]; *People v England*, 84 NY2d 1, 4 [1994]; *People v Kendzia*, 64 NY2d 331, 337 [1985]). The prosecution will be ready for trial if the case cannot go to trial due to no fault of its own (*People v Goss*, 87 NY2d 792 [1996]).
  - **Presumption:** Unless shown otherwise, the prosecution's statement of readiness will sufficiently demonstrate its actual readiness (*People v McCorkle*, 265 AD2d 736 [3d Dept 1999]). The announcement of readiness will be presumed to be accurate and truthful (*People v Brown*, 28 NY3d at 399-400; *People v Bonilla*, 94 AD3d 633, 633 [2012]).
  - **Pre-arraignment:** The prosecution can be ready for trial prior to the defendant's arraignment on the indictment, as arraignment of the defendant is the court's function (*England*, 84 NY2d 1; *People v Price*, 234 AD2d 973 [4th Dept 1997]). However, where the prosecution has secured an indictment so late in the statutory period that it is impossible to arraign the defendant

within the period, the statement of readiness prior to indictment is but illusory (*People v Goss*, 87 NY2d 792 [1996]).

- **Two day rule:** Defendant can be arraigned within the prescribed period only if the indictment was filed at least two days before expiration of the period (CPL 210.10 [2]). Therefore, for the prosecution’s pre-arraignment announcement of readiness to be effective, the prosecution must have indicted the defendant at least two days before the time period has expired (*Carter*, 91 NY2d 795]; *People v Freeman*, 38 AD3d 1253 [4th Dept 2007]; *People v Gause*, 286 AD2d 557 [3d Dept 2001]).
- **Subsequent statement of not ready:** After the prosecution has announced ready, its subsequent statement that it is not ready for trial does not necessarily mean that it was not previously ready for trial, as it had claimed. Indeed, a statement of readiness is presumed to be accurate and truthful (*see People v Bonilla*, 94 AD3d 633, 633 [1st Dept 2012]). Generally, it can be said that the prosecution was not previously ready only if it is shown that its announcement of readiness was made in bad faith or did not reflect an actual present state of readiness (*People v Santana*, 233 AD2d 344 [2d Dept 1996]; *People v South*, 29 Misc 3d 92 [App Term 2010]).
- **Off-calendar declaration of readiness and a request for an adjournment at next court appearance:** Such an off-calendar declaration of readiness is to be “presumed truthful and accurate,” though such a presumption “can be rebutted by a defendant’s demonstration that the People were not, in fact ready at the time the statement was filed.” (*Brown*, 28 NY3d at 399-400).
  - **People’s burden:** “If the People announce that they are not ready after having filed an off-calendar statement of readiness, and the defendant challenges such statement — at a calendar call, in a CPL 30.30 motion, or both — the People must establish a valid reason for their change in readiness status to ensure that a sufficient record is made

for the court to determine whether the delay is excludable.” (*Brown*, 28 NY3d at 399-400.)

- **Defendant’s burden:** “The defendant bears the ultimate burden of demonstrating, based on the People’s proffered reasons and other relevant circumstances, that the prior statement of readiness was illusory.”
- **Subsequent unavailability of evidence:** If, after the prosecution has announced its readiness, the prosecution request an adjournment to obtain additional evidence, the prosecution’s announcement of readiness will be considered illusory unless the prosecution can show that, at the time of its announcement of readiness, the evidence was available or its case, at the time, did not rest on the availability of the additional evidence (*see People v Sibblies*, 22 NY3d 1174, 1181 [2014] [Grafteo, J., concurring]; *People v Bonilla*, 94 AD3d 633, 633 [1st Dept 2012]).
- **Impediments to actual readiness:**
  - **Indictment not yet filed:** The prosecution is not ready for trial when the indictment has been voted by the grand jury but has not yet been filed with the clerk of the court (*People v Williams*, 32 AD3d 403 [2d Dept 2006]; *People v Gause*, 286 AD2d 557 [3d Dept 2001]).
  - **Failure to provide grand jury minutes for inspection:** The prosecution can’t be ready for trial where it has failed to provide grand jury minutes necessary to resolve a motion to dismiss (*People v McKenna*, 76 NY2d 59 [1990]; *People v Harris*, 82 NY2d 409 [1993]; *see also People v Miller*, 290 AD2d 814 [3d Dept 2002] [the time chargeable to prosecution, attributable to post-readiness delay in producing grand jury minutes, commences with date defendant moved for inspection of grand jury minutes]).

- **Failure to produce an incarcerated defendant:** The prosecution is not ready for trial when it has failed to produce a defendant incarcerated in another county or state (*People v England*, 84 NY2d 1, 4 [1994]).
  
- **Failure to file a valid accusatory:** The prosecution cannot be ready for trial if the accusatory is invalid, for the defendant may not be tried on an invalid accusatory, unless the defendant has waived his right to be tried on a valid accusatory instrument (*see People v Weaver*, 34 AD3d 1047, 1049 [3d Dept 2006]; *People v McCummings*, 203 AD2d 656 [3d Dept 1994]; *see also People v Ramcharran*, 61 Misc 3d 234, 237 [Crim Ct, Bronx County 2018] [accusatory failed to allege correct location of offense]; *People v Reyes*, 60 Misc 3d 245, 250 [Crim Ct, Bronx County 2018] [prosecution not ready because it failed to serve a certificate of translation of deposition of non-English speaking complainant]; *People v Friedman*, 48 Misc 3d 817 [Crim Ct, Bronx County 2015] [prosecution ready because information failed to state non-hearsay allegations establishing each element]; *People v Walsh*, 17 Misc 3d 480 [Crim Ct, Kings County 2007] [prosecution not ready because the absence of the docket number on the complainant's corroborating affidavit converting the misdemeanor complaint to a misdemeanor information; the failure to include the docket number is a facial, as opposed to a latent, defect]).
  - o **Misdemeanor complaints:** The prosecution cannot be ready for trial until the misdemeanor complaint has been properly converted to an information, unless prosecution by information has been waived (*People v Gomez*, 30 Misc 3d 643, 651 [Sup Ct 2010]; *People v Gannaway*, 188 Misc 2d 224 [Crim Ct 2000] [field tests conducted were insufficient to convert complaint into a prosecutable information and thus the People were not read for trial]; *People v Peluso*, 192 Misc 2d 33 [Crim Ct 2002] [it has been held that the prosecution cannot be ready where it has converted some but not all of the

charges of a misdemeanor complaint into a misdemeanor information]).

- o **Jurisdictionally defective accusatory:** A defendant does not waive his or her right to be prosecuted by jurisdictionally valid accusatory (i.e. one that alleges each element of the offense charged [see *People v Casey*, 95 NY2d 354, 366 (2000)]) simply by failing to move to dismiss the accusatory on the ground that the accusatory is jurisdictionally defective (see *People v Hatton*, 26 NY3d 364, revg 42 Misc 3d 141 [A] [Sup Ct, App Term 2014]). This means that the prosecution cannot be ready on a jurisdictionally defective accusatory regardless of whether a motion to dismiss on defectiveness grounds has been made.
  
- o **Accusatory with non-jurisdictional defect:** A trial level court has ruled that the prosecution's announcement of readiness on an accusatory having a non-jurisdictional defect (one resting upon hearsay allegations) can be effective where the defendant failed to move to dismiss the information as defective, reasoning that by failing to make the motion to dismiss, the defendant thereby "waived" his right to be prosecuted by information supported by non-hearsay allegations (see *People v Davis*, 46 Misc 3d 289 [County Court, Ontario County 2014]; see also *People v Wilson*, 27 Misc 3d 1049 [Crim Ct 2010] [defendant cannot lie in wait, first raising a challenge to the accusatory instrument in the 30.30 motion, after the time period has expired]). The soundness of the ruling is subject to debate, however. It relies upon *People v Casey* (95 NY2d 354 [2000]) to support the notion that a defendant's failure to move to dismiss the accusatory serves as a waiver of the right to be prosecuted by information supported by non-hearsay allegations. *Casey*, however, held only that by failing to move to dismiss the accusatory, the defendant "waived"

*appellate review* of his complaint that the accusatory rested upon hearsay allegations; in other words, the defendant failed to *preserve* the issue for appellate review (*see* CPL 470.05 [2], 470.35). *Casey* does not appear to have held that the defendant literally waived (or knowingly relinquished) his right to be prosecuted by an information resting on non-hearsay allegations.

- **Unawareness of key witness’s whereabouts:** the prosecution is not ready for trial when it is unaware of the whereabouts of an essential witness and would be unable to locate and produce the witness on short notice (*People v Robinson*, 171 AD2d 475 [1st Dept 1991]).

o **Non-impediments to readiness:**

- **Prosecution’s inability to make out a prima facie case on some – but not all – counts:** The prosecution can be ready for trial if it can make out a prima facie case on one or some, but not all, of the charged offenses (*see e.g. People v Sibblies*, 98 AD3d 458 [1st Dept 2012]; *People v Bargerstock*, 192 AD2d 1058 [4th Dept 1993] and *People v Hunter*, 23 AD3d 767 [3d Dept 2005] [prosecution ready despite unavailability of lab results of rape kit]; *People v Cole*, 24 AD3d 1021 [3d Dept 2005] [prosecution ready for trial despite its motion for a buccal swab of defendant for DNA analysis]; *People v Carey*, 241 AD2d 748 [3d Dept 1997] [prosecution ready despite the unavailability of drug lab results]; *People v Terry*, 225 AD2d 306 [1st Dept 1996] [prosecution can be ready for trial when unavailable evidence is necessary proof for some but not all charged offenses]; *but see People v Mahmood*, 10 Misc 3d 198 [Crim Ct 2005] [criminal charge subject to dismissal where the prosecution not ready on the criminal charge but ready on traffic infractions charged in the same accusatory]).

- **Court congestion:** The prosecution can be ready for trial if its only impediment to proceeding to trial is court congestion (*Smith*, 82 NY2d 676; *People v Figueroa*, 15 AD3d 914 [4th Dept 2005]).
- **Unawareness of witness's current location:** It has been held that the prosecution can be ready for trial even though it is unaware that its key witness has changed jobs, so long as the it could readily learn of the witness's whereabouts and secured his attendance at trial within a few days; the prosecution is not required to contact its witnesses on each adjourned date or be able to produce its witnesses at a moment's notice (*Dushain*, 247 AD2d 234).
- **Discovery violations:** The prosecution can be ready for trial despite its failure to comply with discovery obligations where the discovery violation can be remedied without dismissing the charges (*People v Griffin*, 111 AD3d 1355, 1356 [4th Dept 2013] [failure to provide bill of particulars did not render *People* unready for trial]; *People v Cajigas*, 224 AD2d 370 [1st Dept 1996]).
- **Failure to move to consolidate indictments:** the prosecution can be ready for trial notwithstanding that it hasn't yet moved to consolidate indictments (*People v Newman*, 37 AD3d 621 [2d Dept 2007]).
- **Amendment of indictment:** The fact that the prosecution has moved to amend the indictment does not render the prior announcement of readiness illusory (*People v Niver*, 41 AD3d 961 [3d Dept 2007]).
- **The superseding of a valid indictment:** The mere fact that an indictment has been superseded does not mean that the original indictment was invalid or that the prosecution was not ready for trial until the filing of the new indictment (*People v Stone*, 265 AD2d 891 [4th Dept 1999]).

## ➤ EXCLUDABLE TIME

- o **In general:** Certain periods - identified by statute (CPL 30.30 [4]) - are excluded from the time calculation. Only those periods falling within the specified exclusions qualify. Any period during which the 30.30 clock is ticking will be considered in determining excludable time. Therefore, where the action commences with the filing of an accusatory that is subsequently replaced by a new accusatory, the period to be considered for exclusion begins with the filing of the original accusatory, so long as the new accusatory directly derives from the initial one. This is true even if the new accusatory alleges different charges (*People v Farkas*, 16 NY3d 190 [2011]; *People v Flowers*, 240 AD2d 894 [3d Dept 1997]).
  
- o **Delay “resulting from” requirement:** Many – but not all – of the excludable time provisions will permit exclusion of periods of delay only when the delay at issue “results from” a particular circumstance (e.g. other proceedings concerning the defendant, the defendant’s absence or unavailability, the detention of the defendant in another jurisdiction, or “exceptional circumstances”). By their express language, those excludable time provisions do not allow for exclusion of time where the particular circumstance at issue (e.g. the defendant’s absence or unavailability) does not cause the prosecution to be unready (*see Sturgis*, 38 NY2d 625 [partially abrogated by legislative amendment]; *People v Callender*, 101 Misc 2d 958, 960 [Crim Ct, New York County 1979] [“The *Sturgis* case therefore stands for the proposition that, in order for time to be excludable as resulting from the defendant's conduct, such conduct must have contributed to the failure of the People to answer that they were ready for trial”]).
  - **Example:** Where the prosecution’s delay in preparedness is due only to the defectiveness of an accusatory (and is no fault of the defendant), exclusion of periods of delay should not be permitted under any of the excludable time provisions requiring that the delay in readiness “result from” a particular circumstance.
  
- o **Where causal relationships not required:** There are a number of excludable time provisions that permit exclusion of periods due to a particular circumstance without regard to whether the particular circumstances caused the delay at issue (*see* 30.30 [4] [c] [ii], [d], [h],

[i], [j]; *see also* *People v Bolden*, 81 NY2d 146, 151-152 [1993] [partially abrogated by legislative amendment]; *People v Kanter*, 173 AD2d 560, 561 [2d Dept 1991] [some periods during which a jurisdictionally defective accusatory is in place may be excludable]; *People v Flowers*, 240 AD3d 894 [3d Dept 1997] [same]).

- **Requested or consented to adjournments exception:** The Court of Appeals has held that where the defendant has requested or consented to an adjournment, the defendant waives chargeability of the delay, regardless of whether the adjournment causes the prosecution’s delay in readiness – that the 4 (b) excludable time provision rests generally on theories of estoppel or waiver (*People v Worley*, 66 NY2d 523 [1985]; *see also* *People v Kopciowski*, 68 NY2d 615, 617 [1986] [Where adjournments are allowed at defendant’s request, those periods of delay are expressly waived in calculating the prosecution’s trial readiness, without the need for the People to trace their lack of readiness to defendant's actions]).

o **Excludable time provisions**

- **“Other proceedings”:** Periods of “reasonable” delay “resulting” from “other proceedings” concerning the defendant, including pretrial motions, are excludable (30.30 [4] [a]). It should be noted that the prosecution may be able to exclude a time period during which an “other proceedings” is pending, even if the “other proceeding” doesn’t necessarily prevent the prosecution from becoming ready, if it can be shown that the prosecution might have been wasting time or resources by getting ready for trial while the “other proceeding” was pending (*People v Dean*, 45 NY2d 651, 658 [1978]).
  - **Trial on another case:** Reasonable delay resulting from trial of defendant on another indictment is excludable (*People v Oliveri*, 68 AD3d 422 [1st Dept 2009]; *People v Hardy*, 199 AD2d 49 [1st Dept 1993]).

- **Pretrial motions:** The prosecution is entitled to exclude from the time calculation *reasonable* delay associated with the filing of pretrial motions. In some instances, the prosecution is entitled to exclude delay caused by the defendant's mere expressed intention to file a motion (*People v Brown*, 99 NY2d 488 [2003]). The time excluded is "the period during which such matters are under consideration"; however, only delay that is reasonable may be excluded (30.30 [4] [a]; *People v Inswood*, 180 AD2d 649 [2d Dept 1992]).
- **Motions to terminate prosecution pursuant to CPL 180.85:** The period during which such motions are pending is *not* excludable (*see* CPL 180.85 [6]).
- **Grand jury minutes:** The prosecution may exclude a reasonable period necessary to obtain and inspect grand jury minutes (*People v Beasley*, 69 AD3d 741 [2d Dept 2010], *affd on other grounds*, 16 NY3d 289 [2011]; *People v Del Valle*, 234 AD2d 634 [3d Dept 1997]).
  - **Unreasonable delay:** It has been held that a four month delay in providing grand jury minutes is not reasonable and thus not entirely excludable (*People v Johnson*, 42 AD3d 753 [3d Dept 2007]).
- **Motions to dismiss/reduce:** The period from defendant's filing of omnibus motion seeking dismissal of indictment until date of dismissal is excludable except to the extent that resolution of the motion was unreasonably delayed (*People v Roebuck*, 279 AD2d 350 [1st Dept 2001]).
  - **Prosecution's affirmation to reduce felony charge:** It has been held that such affirmation is not a pretrial motion and its filing does not result in excludable time pursuant to CPL 30.30 (4) (c) (*People v Thomas*, 59 Misc 3d 64 [App Term 2018]).

- **30 day period following indictment dismissal:** 30 days following the issuance of an order dismissing an indictment or reducing a count of the indictment may be excludable since the effect of the order is stayed for 30 days following the entry of that order (*see* CPL 210.20 [6]).
- **Discovery:** Reasonable period of time needed to accommodate defense counsel’s request for production of discovery, such as a recording of a telephone call to 911, is excludable (*People v McCray*, 238 AD2d 442 [2d Dept 1997]).
- **Suppression Motions:** Reasonable delay resulting from defendant’s motion to suppress is excludable as delay resulting from “other proceedings” (*People v Hernandez*, 268 AD2d 344 [4th Dept 2000]). Nevertheless, it can be argued that a motion to suppress will not *result* in *reasonable* delay, and thus the period during which the motion is under consideration is not excludable, where the motion to suppress does not prevent the prosecution from both preparing for the suppression motion and getting ready for trial or where, in light of the nature of the evidence sought to be suppressed, it would not be a waste of the prosecution’s time to simultaneously prepare for the suppression motion and get ready for trial.
- **Prosecution’s motions:** Excludable time includes period of reasonable delay *resulting* from the prosecution’s pretrial motions (*People v Sivano*, 174 Misc 2d 427 [App Term 1997]; *People v Kelly*, 33 AD3d 461 [1st Dept. 2006] [period during which prosecution’s motion to consolidate is pending held to be excludable]).
- **Codefendant’s motions:** Periods of delay resulting from motions made by codefendant may be excludable (*People v Durette*, 222 AD2d 692 [2d Dept 1995]).

- **Defendant’s motions in unrelated case:** Delay due to defendant’s motion in unrelated case against defendant, or, in some instances, mere announced intention to file motion, may be excludable (*People v Brown*, 99 NY2d 488 [2003]).
- **Additional time necessary to prepare for trial as a result of the decision on the motion:** Such period may also be excludable (*People v Patel*, 160 AD3d 530, 530 [1st Dept 2018] [excludable period included “reasonable time to prepare after the court’s decision on defendant’s pretrial motion, where the court had dismissed, with leave to re-present, the second count of the indictment and adjourned for a control date”]; *People v Davis*, 80 AD3d 494 [1st Dept 2011] [additional time needed to prepare as the result of the granting of a consolidation motion]; *People v Ali*, 195 AD2d 368, 369 [1st Dept 1993] [“With regard to the 39-day adjournment granted to the People to prepare for trial after the denial of defendant’s first CPL 30.30 motion, inasmuch as the present case involved numerous defendants and has some evidentiary peculiarities, such period, while arguably too lengthy, cannot be said to have been unreasonable”).
- **Reasonableness requirement:** The prosecution cannot exclude delay caused by their “abject dilatoriness” in responding to the defendant’s motion and in preparing for hearing (*People v Reid*, 245 AD2d 44 [1st Dept 1997]).

- o **Examples**

- Delay of over a year in making motion to reargue suppression motion unreasonable and not excludable (*People v Ireland*, 217 AD2d 971 [4th Dept 1995]).
- Approximately half of the two month delay resulting from the prosecution’s preparation for a suppression hearing was held to be

unreasonable (*People v David*, 253 AD2d 642 [1st Dept 1998]).

- Only 35 of 54 days of delay associated with the defendant's pretrial motions were excludable since the 14 of the days it took the prosecution to respond to pretrial motions was reasonable and only 21 of the days it took the court to decide the motion was reasonable delay (*People v Gonzalez*, 266 AD2d 562 [2d Dept 1999]).
- **Appeals:** Reasonable delay associated with appeals, whether it is the defendant's or the prosecution's, is excludable under CPL 30.30 (4) (a).
  - o **Period to be excluded:** Period between the prosecution's filing notice of appeal from an order dismissing indictment and appellate ruling reinstating that indictment is excludable, but the period between dismissal and the filing of the notice of appeal is not necessarily excludable (*People v Holmes*, 206 AD2d 542 [2d Dept 1994]; *People v Vukel*, 263 AD2d 416 [1st Dept 1999]).
  - o **Reasonableness of the delay:** The prosecution may not exclude the entire period of delay due to its appeal if it's dilatory in perfecting the appeal (*People v Muir*, 33 AD3d 1058 [3d Dept 2006]; *People v Womak*, 263 AD2d 409 [1st Dept 1999]). It has been held that the delay in perfecting an appeal to await a decision of the Court of Appeals that would resolve the issue on appeal is excludable as "reasonable" (*People v Barry*, 292 AD2d 281 [1st Dept 2002]).

- o **The period following an order granting a new trial has become final will not automatically be excludable:** Pursuant to CPL 30.30 (5) (a), a new criminal action will be said to have commenced when the intermediate appellate court's order granting a new trial has become final, typically when a judge of the Court of Appeals has denied the People leave to appeal (*see People v Wells*, 24 NY3d 971 [2014]). The period immediately following the commencement of this new criminal action will not be automatically excluded as a period of delay associated with the defendant's appeal. It will only be excluded if the prosecution establishes on the record justification for the post-appeal delay. (*Wells*, 24 NY3d 971.)
- **Psychiatric evaluation of defendant:** The period of delay resulting from the prosecution's psychiatric evaluation of a defendant raising an insanity defense is excludable as delay resulting from "other proceedings" (*People v Jackson*, 267 AD2d183 [1st Dept 1999]).
- **Defendant's testimony before grand jury:** Reasonable delay resulting from need to accommodate defendant's request to testify before grand jury is excludable (*People v Casey*, 61 AD3d 1011 [3d Dept 2009]; *People v Merck*, 63 AD3d 1374 [3d Dept 2009]).
- **Defense requested or consented to continuances (30.30 [4] [b]):** This provision renders excludable delay resulting from a continuance granted by the court at the request, or with the consent, of the defendant or his counsel. The provision permits exclusion only if the court has granted the continuance "satisfied that the postponement is in the interest of justice, taking into account the public interest in the prompt dispositions of criminal charges."
- **Court ordered:** Adjournments are excludable only if court ordered (*People v Suppe*, 224 AD2d 970 [4th Dept 1996]). Thus, the period under which plea negotiations are

ongoing is not excludable under this subdivision unless the court has ordered the case continued for that purpose (*People v Dickinson*, 18 NY3d 835 [2011]).

- **Interests of Justice:** Adjournments are excludable only if ordered in the interests of justice. (*People v Rivas*, 78 AD3d 739 [2d Dept 2010] [holding that an adjournment was not excludable for 30.30 purposes, though court-ordered and expressly consented to by the defendant, because, as the trial court found, the adjournment had not been ordered to further the interests of justice]).
- **Consent or request:** Adjournments are excludable only if consented to or requested by the defendant or counsel (*People v Suppe*, 224 AD2d 970 [4th Dept 1996]; *see also People v Coxon*, 242 AD2d 962 [4th Dept 1997] [adjournment not excludable where defendant initially requested adjournment for mental health evaluation; trial court stated that it would grant adjournment only on condition that defendant waive presentment before grand jury; defendant was unwilling to waive that right; and court adjourned the matter without setting another appearance date]).
  - o **Clearly expressed:** The defendant will be deemed to have consented to or requested the adjournment only if the request or consent was "clearly expressed by the defendant or defense counsel" (*People v Liotta*, 79 NY2d 841 [1992]; *People v Collins*, 82 NY2d 177 [1993]). It is not enough for the prosecution to make the unsubstantiated claim that the adjournment was "agreed" or understood" (*People v Smith*, 110 AD3d 1141, 1143 [3d Dept 2013]).
  - o **Failure to object:** The defendant's failure to object to adjournment does not equate to consent (*People v Liotta*, 79 NY2d 841 [1992]; *People v Collins*, 82 NY2d 177 [1993]).

- o **Assertions approving the particular adjourn date:** Defense counsel’s statement to the court that a particularly adjournment date was “fine” does not constitute consent to the adjournment (*People v Barden*, 27 NY3d 550 [2016]; *People v Brown*, 69 AD3d 871 [2d Dept 2010]; *People v Nunez*, 47 AD3d 545 [1st Dept 2008]; cf. *New York v Hill*, 528 US 110 [2000]).
- **On the record:** Defendant’s request for or consent to the adjournment, and the basis for the adjournment, must be on the record (*People v Liotta*, 79 NY2d 841 [1992]; *People v Bissereth*, 194 AD3d 317, 319 [1st Dept 1993]). The onus is upon the prosecution to ensure that the record reflects that the defendant requested or consented to the adjournment on the record (*People v Robinson*, 67 AD3d 1042 [3d Dept 2009]).
- **Defense request for adjournments beyond that initially requested by the prosecution:** Where the prosecution initially requests an adjournment to a specific date, and defense counsel does not expressly consent to that adjournment but, because of counsel’s unavailability on that date, requests a later date, the period between the adjourn date requested by the prosecution and the date requested by defense counsel will be excludable *if defense counsel does more than state that he or she is unavailable and instead requests additional time and explains why additional time is needed* (*Barden*, 27 NY3d at 554-555).
- **Adjourn dates set beyond the date requested by either the prosecution or the defense:** Where the court sets the next court date beyond the adjourn date requested by either the prosecution or the defendant, the period beyond the date requested will not be excludable unless defense counsel has clearly expressed consent to the entire adjourned period. Defense counsel’s ambiguous statement in response to the adjourn date set by the court – “that’s fine” – will not be sufficient to charge the defendant with that additional period. (*Barden*, 27 NY3d at 555-556).

- **Dismissed case:** Defendant is without power to consent to an adjournment of a case that has been terminated by an order of dismissal (*People v Ruparelia*, 187 Misc 2d 704 [Poughkeepsie City Ct. 2001]).
- **Defendant-requested delay of indictment:** It has been held that where defense counsel’s request to delay filing of indictment directly affected the prosecution’s readiness, the period is excludable as an adjournment requested by defendant (*People v Greene*, 223 AD2d 474 [1st Dept 1996]). That holding cannot be reconciled with the plain language of the statute, stating that only delay resulting from a continuance “granted by the court” is excludable (*People v Suppe*, 224 AD2d 970 [4th Dept 1996]; *see also Dickinson*, 18 NY3d 835).
- **Co-defendant’s request:** Adjournment requested by co-defendant is excludable where the defendant and co-defendant are tried jointly (*People v Almonte*, 267AD2d 466 [2d Dept 1999]).
- **Defendant who is without counsel:** “A defendant who is without counsel must not be deemed to have consented to a continuance unless he has been advised by the court of his [30.30] rights . . . and the effect of his consent.”
- **No *resulting* delay required:** While this statutory provision states that the prosecution is entitled to exclusion of “delay” “resulting” from the continuance, the Court of Appeals has held that the prosecution is not required under this provision to show that the continuance actually delayed its readiness for trial. The Court of Appeals has held that where the defendant has requested or consented to an adjournment, the defendant waives chargeability of the delay, regardless of whether there is a causal link between the adjournment and the prosecution’s lack of readiness – that the 4 (b) excludable time provision rests generally on theories of estoppel or waiver. (*People v Worley*, 66 NY2d 523 [1985]; *see also*

*People v Kopciowski*, 68 NY2d 615, 617 [1986] [“Where adjournments are allowed at defendant’s request, those periods of delay are expressly waived in calculating the People’s trial readiness, without the need for the People to trace their lack of readiness to defendant’s actions”].)

- **Delay due to the defendant’s failure to appear (30.30[4] [c]):** The clock will stop ticking during the period of delay resulting from the defendant’s failure to appear if it is shown that the defendant was “unavailable” or “absent.”
  - **Absent:** "Absent" means that the prosecution is *unaware* of the defendant’s location and the defendant is attempting to avoid apprehension or prosecution or that the prosecution is unaware of the defendant’s location and his location cannot be determined with due diligence (CPL 30.30 [4] [c] [i]).
    - **Avoiding apprehension or prosecution:** The defendant’s use of a different name in a subsequent arrest or flight to another jurisdiction may evince an intent to “avoid apprehension” (*People v Motz*, 256 AD2d 46 [1st Dept 1998]; *People v Williams*, 78 AD3d 160 [1st Dept 2010]; *People v Button*, 276 AD2d 229 [4th Dept 2000]).
    - **Incarcerated defendant:** A defendant may be “absent” due to his *unknown* incarceration, if the prosecution has exercised due diligence to locate him or if the defendant, while incarcerated on the other matter, continues to avoid prosecution (CPL 30.30 [4] [c] [i]). However, a defendant is not “absent” if the prosecution is aware of the defendant’s incarceration or could have been made aware had it exercised due diligence (*People v Lesley*, 232 AD2d 259 [1st Dept 1996]).
      - **Incarceration under false name:** Where the defendant is incarcerated under a false name but the People have enough

information to locate him despite his use of an alias, the defendant will not be considered “absent,” assuming that the defendant, by giving the false name, was not attempting to avoid apprehension or prosecution (*People v Lesley*, 232 AD2d 259 [1st Dept 1996]).

- **Unavailability:** A defendant is considered unavailable whenever his location is known and his presence cannot be secured even with due diligence.
- **Due diligence:** Due diligence means to exhaust all reasonable investigative leads (*People v Petrianni*, 24 AD3d 1224 [4th Dept 2005]; *People v Grey*, 259 AD2d 246 [3d Dept 1999]; *People v Walter*, 8 AD3d 1109 [4th Dept 2004]; *see also People v Devino*, 110 AD3d 1146, 1149 [3d Dept 2013] [police obligated to diligently utilize "available law enforcement resources" and cannot exclude the delay by relying on implicit "resource-allocation choices"]).
  - **Applicability:** The due diligence question comes into play when the prosecution seeks to exclude delay resulting from the defendant’s absence or unavailability. If the prosecution has timely established its readiness for trial within the statutory period, and do not seek to have a period excluded because of the defendant’s absence or unavailability, it does not matter whether the prosecution has exercised due diligence to locate or produce the defendant (*Carter*, 91 NY2d at 799).
  - **Examples of due diligence:**
    - authorities sent letters to defendant’s last known address, repeatedly sought assistance of out-of-state authorities to locate the defendant in that state, and frequently sought information from New York and out-of-state

DMV (*People v Petrianni*, 24 AD3d 1224 [4th Dept 2005]);

- authorities tried to locate defendant, who was known to spend time in both Canada and Plattsburgh, by placing defendant's name in customs' computer (and thereby notified all points of entry); distributed defendant's photo to custom officials, border patrol, Plattsburgh police department, and Canadian authorities; obtained the help of elite squads of police to help locate defendant in Plattsburgh; looked for defendant in motels, malls, and bars known to be frequented by defendant; contacted defendant's relatives in the Plattsburgh area; and used a ruse to lure defendant into a bingo hall (*People v Delaroude*, 201 AD2d 846 [3d Dept 1994]);
- authorities made visits to defendant's last known address, contacting defendant's relatives and neighbors, and thoroughly investigated all leads (*People v Garrett*, 171 AD2d 153 [2d Dept 1991]);
- authorities repeatedly visited defendant's last known address, leaving cards with family members when informed that defendant was living on the street, and circulated wanted posters (*People v Lugo*, 140 AD2d 715 [2d Dept 1988]); and
- law enforcement went to defendant's last known home address repeatedly, twice visited defendant's aunt, looked for the defendant at locations he frequented, contacted defendant's last known employer, and checked with the DMV and social services (*People v Hutchenson*, 136 AD2d 737 [2d Dept 1988]).

o **Examples of due diligence lacking:**

- authorities failed to check with the Department of Probation though the defendant was on probation (*People v Hill*, 71 AD3d 692 [2d Dept 2010]);
  - authorities failed to look for defendant at his mother's home, where he was known to spend nights (*In re Yusef B.*, 268 AD2d 429 [2d Dept 2000]);
  - law enforcement failed to locate the defendant who was incarcerated in a state facility under same name and NYSID number (*People v Ramos*, 230 AD2d 630 [1st Dept 1996]);
  - the government made sporadic computer checks while failing to check defendant's last known address (*People v Davis*, 205 AD2d 697 [2d Dept 1994]); and
  - the State Police confined their efforts to locate the defendant to within the assignment zone of their investigating unit and made unspecified efforts to locate the defendant through governmental agencies, including support collection (*People v Devino*, 110 AD3d at 1149).
- **Automatic exclusion provision:** Regardless of whether diligent efforts have been used to locate the defendant or whether the defendant's absence has caused the delay at issue, the defendant's absence will be excludable where the defendant has either escaped from custody or has failed to appear after being released on bail or his own recognizance, *provided* that the defendant is not held in custody on another matter and a bench warrant has been issued. The time excluded is the entire period between the

day the bench warrant is issued and the day the defendant appears in court (CPL 30.30 [4] [c] [ii]; *People v Wells*, 16 AD3d 174 [1st Dept 2005]).

- o **In custody on another matter:** Pursuant to the plain and unambiguous language of this provision, there is no automatic exclusion during any period in which the defendant is being held in custody on another matter. However, that period will be excludable if the People can show that they exercised due diligence to secure the incarcerated defendant's presence (*People v Bussey*, 81 AD3d 1276 [4th Dept 2011]; *People v Newborn*, 42 AD3d 506 [2d Dept 2007]; *People v Mane*, 36 AD3d 1079 [3d Dept 2007]; *see also* CPL 30.30 [4] [e] [excludable time includes "the period of delay resulting from detention of the defendant in another jurisdiction provided the district attorney is aware of such detention and has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial"]).

- **Contrary holdings:** Some courts have held otherwise and have interpreted the "in custody on another matter" language more narrowly. They have interpreted it to allow automatic exclusion of the period during which the defendant was incarcerated on another matter so long as the defendant was *not in custody at the time he first failed to appear and a bench warrant was issued*. If the defendant was not in custody at the time the bench warrant was issued and was later taken into custody on another matter, the entire period between the issuance of the bench warrant and the defendant's eventual appearance in court is to be automatically excluded, even the time during which the defendant is in custody on the other matter (*see People v Mapp*, 308 AD2d 463 [2d Dept

2003]; *People v Howard*, 182 Misc 2d 549, 551-553 [Sup Ct, New York County 1999]; *People v Penil*, 18 Misc 3d 355 [Sup Ct, Bronx County 2007]).

- **Knowledge of custody status:** It has been further held, however, that when authorities (either the police or the District Attorney) learn of the defendant's subsequent incarceration, the automatic exclusion provision no longer applies (and due diligence to secure the defendant's presence must be shown to establish the defendant's unavailability), whether or not the defendant was incarcerated at the time he first failed to appear and the bench warrant was issued (*see Mapp*, 308 AD2d at 464).
- **Delay resulting from defendant's incarceration in another jurisdiction:** Also excludable is the period of delay resulting from the defendant's detention in another jurisdiction, provided the People are aware of the defendant's detention and the People have been "diligent" and have "made reasonable efforts to obtain the presence of the defendant for trial" (CPL 30.30 [4] [e]). Such period of time may also be excludable due to the defendant's "unavailability" (CPL 30.30 [4] [c] [i]).
  - **Diligent and reasonable efforts requirement:** The prosecution may exclude delay under this provision only if it shows that the defendant's presence could not be secured with due diligence. The prosecution, for instance, will not be permitted to exclude the delay if it merely filed a detainer to secure the defendant's presence (*People v Billups*, 105 AD2d 795 [2d Dept 1984]).
    - **Futile steps:** However, the due diligence requirement does not mandate that the prosecution seek the defendant's presence where the use of the

available procedures is shown to be futile. For instance, it has been held that the due diligence requirement is satisfied in a case in which the defendant is held in federal custody in another state, though the prosecution failed to secure defendant's presence through the use of a writ of habeas corpus, where it was shown that the federal government would not relinquish custody of the defendant until the defendant was sentenced (*People v Mungro*, 74 AD3d 1902 [4th Dept 2010], *affd* 17 NY3d 785 [2011]).

- o **Defendant held on pending charges in another jurisdiction:** It has been held that the prosecution is not expected to request that the defendant be released to New York while charges are still pending in the other jurisdiction. It is enough that the prosecution is in regular contact with the other jurisdiction while the charges are still pending there. (*People v Durham*, 148 AD3d 1293 [3d Dept 2017]).
- **Federal custody:** Delay associated with the defendant incarceration in a federal prison is excludable where it is shown that the defendant cannot be produced even with due diligence (*People v Clark*, 66 AD3d 1415 [4th Dept 2009]).
  - o **Due diligence requirement:** Adjournments caused by the prosecution's repeated failure to produce defendant from federal custody are not excludable where the prosecution failed to pursue statutorily prescribed methods for securing the defendant's presence (*People v Scott*, 242 AD2d 478 [1st Dept 1997]).
    - **Writ of habeas corpus ad prosequendum:** The prosecution will not be said to have acted diligently and have used reasonable effort to secure a defendant in federal custody

where it has not sought his production by way of a writ of habeas corpus ad prosequendum, pursuant to CPL 580.30 (*People v Scott*, 242 AD2d 478 [1st Dept 1997]), unless it shows that use of that procedure would have been futile due to the federal government's unwillingness to allow defendant's production (*People v Gonzalez*, 235 AD2d 366 [1st Dept 1997]).

- **Exceptional Circumstances (30.30 [4] [g]):** Delay caused by “exceptional circumstances” will be excluded.
  - **Unavailability of a witness:** Delay due to the unavailability of a witness will be excludable; however, it is so only if the prosecution can show that it has exercised due diligence in securing the witness (*People v Douglas*, 47 Misc 3d 1218 [Crim Ct, Bronx County 2015]; *People v Zimny*, 188 Misc 2d 600 (Sup Ct 2001)).
    - **Disappearance of witness:** delay due to the prosecution's inability to locate a witness is excludable as an exceptional circumstance if the prosecution has exercised due diligence to locate the witness (*People v Thomas*, 210 AD2d 736 [3d Dept 1994]; *see e.g. People v Figaro*, 245 AD2d 300 [2d Dept 1997] [period of delay due to the complainant's disappearance was not excludable, where the prosecution, in an attempt to locate the complainant, made a single visit to the complainant's home and only a "few" phone calls]).
    - **Witness's departure to another country:** Delay associated with a witness's departure to another country will be excludable if the prosecution has demonstrated due diligence to secure the witness's attendance – that is to say, “vigorous activity to make the witness available” (*People v Belgrave*, 226 AD2d 550 [2d Dept 1996]; *see e.g. People v Hashim*, 48 Misc 3d 532 [Crim Ct, Bronx County

2015] [prosecution failed to show that due diligence was exercised where the “complainant made no plans to come back to the United States until the [prosecution] gave him a ‘firm’ trial date”; the prosecution did not show it was unable, despite its best efforts, to schedule trial before the witness’s departure or to secure his return; and on “more than one occasion . . . the [prosecution] could have told the witness either not to leave or to return to the United States in anticipation of one of the trial dates”]).

- o **Deployment of witness in overseas military service:** Unavailability of key witness due to military deployment is excludable upon a showing of due diligence (*People v Onikosi*, 140 AD3d 516, 517 [1st Dept 2016]; *People v Williams*, 293 AD2d 557 [2d Dept 2002]).
- o **Injury or illness of prosecution witness:** The injury or illness of a prosecution witness, rendering the witness unavailable, is an exceptional circumstance (*People v Womak*, 229 AD2d 304 [1st Dept 1996] *affd* 90 NY2d 974 [1997] [period during which arresting officer was unavailable due to maternity leave is excludable delay]; *People v McLeod*, 281 AD2d 325 [1st Dept 2001] [large and cumbersome cast in which officer’s right arm was encased constituted a sufficiently restricting injury to qualify officer as medically unable to testify]; *People v Sinjaj*, 291 AD2d 513 [2d Dept 2002] [witness unavailable due to emotional trauma brought on by the crime is an exceptional circumstance]).
- o **Police witness’s unavailability due to participation in mandatory training:** Period during which the police witness is participating in a mandatory training program only if the prosecution has demonstrated due diligence to make the witness

available. Thus, in *People v Friday* (160 AD3d 1052 [3d Dept 2018]), it was held that such a period could not be excluded as the prosecution made no effort to learn whether the witness could switch to another training program that did not conflict with the trial.

- **People’s burden:** “Although the prosecutor’s representation is typically sufficient to establish the witness’s unavailability due to medical reasons, due diligence is not satisfied when the prosecution merely states a naked (albeit valid) reason for the unavailability or rely on hearsay information from family members that the witness is unavailable” (*People v Douglas*, 47 Misc 3d 1218 [Crim Ct, Bronx County 2015]).
- **Defendant’s mental incompetency:** Delay caused by defendant’s commitment after being declared incompetent to stand trial is excludable as an exceptional circumstance; the People have no obligation to monitor competency status (*People v Lebron*, 88 NY2d 891 [1996]).
- **Special Prosecutor:** The appointment of a special prosecutor is an exceptional circumstance such that the associated delay is excludable (*People Crandall*, 199 AD2d 867 [3d Dept 1993]; *People v Morgan*, 273 AD2d 323 [2d Dept 2000]).
- **Obtaining evidence from defendant:** Delay associated with obtaining blood and saliva samples from defendant, performing DNA tests, and obtaining results has been held to be excludable as stemming from an exceptional circumstance (*People v Williams*, 244 AD2d 587 [2d Dept 1997]).
  - **DNA testing delay:** Delay associated with obtaining DNA results is not necessarily excludable

as an exceptional circumstance. The prosecution may exclude the period only if it shows that the evidence was unavailable during that period despite the exercise of due diligence. (*see People v Clarke*, 28 NY3d 48 [2016] [no reasonable excuse for the prosecution’s delay in seeking court order for defendant’s DNA exemplar]; *People v Huger*, -- AD3d --, 2018 NY Slip Op 08955 [2d Dept 2018] [prosecution failed to demonstrate due diligence in obtaining DNA results]; *People v Gonzalez*, 136 AD3d 581 [1st Dept 2016] [same]; *People v Wearen*, 98 AD3d 535 [2d Dept 2012] [same]).

- **Example:** “People’s inaction in obtaining defendant’s DNA exemplar, the 161-day period of delay to test the DNA and to produce the DNA report was not excludable from speedy trial computation as an exceptional circumstance” (*Clarke*, 28 NY3d at 52).
- **People’s unawareness of charges:** The delay between the date a complaint is filed and the date the prosecution first receives notice of the filing has been held to be excludable where the court clerk or police delay giving the prosecution notice of the filing (*People v Smietana*, 98 NY2d 336 [2002] [the delay between the date the filing of the misdemeanor information by police and the defendant’s arraignment on that information is excludable under the “exceptional circumstances” provision, where the police prepared the information without knowledge or involvement of prosecutor, and police did not inform the prosecutor of the charges until the arraignment date]; *see also* CPL 110.20 [requiring that a copy of the accusatory instrument filed in local court be promptly transmitted to the District Attorney]; *People v Snell*, 158 AD3d 1067, 1068 [4th Dept 2018]; *People v La Bounty*, 104 AD2d 202 [4th Dept 1984]).

- o **Failure of local criminal court to transmit divesture documents not an exceptional circumstance:** The time during which the local criminal court failed to transmit the order, felony complaint and other documents pursuant to CPL 180.30 (1) to County Court is not excludable time under the exceptional circumstances provision as it does not prevent the prosecution from presenting case to the grand jury (*People v Amrhein*, 128 AD3d 1412 [4th Dept 2015]).
- **Adjournments to await appellate decision resolving dispositive legal issue:** Such delay has been held *not* to be occasioned by an exceptional circumstance (*People v Price*, 14 NY3d 61 [2010]).
- **Disaster:** Delay resulting from a natural disaster has been found to be an exceptional circumstance (*People v Sheehan*, 39 Misc 3d 695 [Crim Ct, New York County 2013] [Hurricane Sandy]).
- **No counsel:** The period defendant is without counsel through no fault of the court, except where the defendant proceeds pro se, is excludable (30.30 [4] [f]; *People v Sydlar*, 106 AD3d 1368, 1369 [3d Dept 2013]).
  - **Definition of “without counsel” includes not having counsel present:** The phrase “without counsel” has been given a broader definition than not having an attorney. It includes not having counsel present at the court proceeding (*People v DeLaRosa*, 236 AD2d 280, 281 [1st Dept 1997]; *People v Bahadur*, 41 AD3d 239 [1st Dept 2007]; *People v Lassiter*, 240 AD2d 293 [1st Dept 1997]; *People v Corporan*, 221 AD2d 168 [1st Dept 1995]).
    - o **Prosecution’s fault:** it has been held that the defendant is not “without counsel” where counsel’s absence is the prosecution’s fault, for example, where counsel does not appear because the prosecution failed to comply with its obligation to

produce incarcerated defendant (*People v Brewer*, 63 AD3d 402 [1st Dept 2009]).

- **Codefendant:** Period during which codefendant is without counsel is excludable (*People v Rouse*, 12 NY3d 728 [2009])
- **Newly assigned counsel:** A defendant is not “without counsel” within the meaning of the statute when he is recently assigned counsel, even though the lawyer knows nothing about case (*Rouse*, 12 NY3d 728).
- **No showing of delay required:** All periods during which the defendant is without counsel through no fault of the court must be excluded, regardless of whether the defendant’s lack of representation actually impeded the People’s progress (*People v Huger*, -- AD3d --, NY 2018 Slip Op 08955 [2d Dept 2018]; *People v Aubin*, 245 AD2d 805 [3d Dept 1997]; *see e.g. People v Rickard*, 71 AD3d 1420 [4th Dept 2010] [court excluded period between defendant’s arraignment (when court faxed to the Public Defender an assignment order) and the Public Defender’s first appearance in court (when the Public Defender advised the District Attorney that the defendant was waiving his preliminary hearing)]).
- **Assigned Counsel Program’s failure:** Assigned Counsel Program’s failure to provide counsel to the defendant may be deemed the fault of the court, depending upon the relationship and connection between the court and the program (*Cortes*, 80 NY2d at 209; *see e.g. People v Danise*, 59 Misc 3d 829, 831 [City Ct 2018] [“Since it remains the court’s responsibility to supervise the assignment of counsel to eligible indigent defendants, the pre-readiness delay caused by the unavailability of a public defender at arraignment, is considered a fault of the court, and therefore, the People will be charged with this delay”]).



- o **Executive Order:** It has been held that a period may be excluded where there is in effect governor's executive order directing that time be tolled due to a disaster or other emergency (*People v Sheehan*, 39 Misc 3d 695 [Crim Ct, New York County 2013] [Hurricane Sandy]).

➤ **POST-READINESS DELAY**

- o **Defined:** Dismissal may be warranted even where the prosecution has established its readiness within the statutory period if the prosecution subsequently becomes unready and the aggregate of the pre-readiness and post-readiness delay exceeds the prescribed period (*People v McKenna*, 76 NY2d 59 [1990]; *People v Anderson*, 66 NY2d 529 [1985]).
  - **The prosecution must have caused the delay:** The prosecution will be charged with post-readiness delay only to the extent that it is responsible for the delay (*Dushain*, 247 AD2d 234; *Cortes*, 80 NY2d 201).
  - **Test:** The test is whether the prosecution is no longer in fact ready for trial – i.e., whether the prosecution has not done everything required of it to bring the case to a point it can be tried (*England*, 84 NY2d 1; *Robinson*, 171 AD2d at 477; *Kendzia*, 64 NY2d at 337).
- o **Adjournments:** Where the prosecution requests an adjournment, the entire adjourned period constitutes post-readiness delay unless the prosecution re-announces its readiness during the adjourned period or the prosecution had requested an adjournment for a date certain and the adjournment exceeded the period requested (*People v Betancourt*, 217 AD2d 462 [1st Dept 1995]; *People v Barden*, 27 NY3d 550, 554-556 [2016]).
  - **Re-announcement of readiness:** The prosecution may re-announce its readiness during the adjourned period by filing a notice of readiness and thereby avoid being charged with the entire adjourned period (*Stirrup*, 91 NY2d 434).



- o **Post-readiness delay not chargeable to the prosecution**
  - **Delay caused by *court* stenographer not under the prosecution's control:** Delay caused by *court* stenographer's failure to timely provide relevant minutes is not chargeable to the prosecution (*People v Lacey*, 260 AD2d 309 [1st Dept 1999]).
  - **A *non-incarcerated* defendant's failure to appear:** Delay due to the defendant's failure to appear, regardless of whether due diligence is exercised to locate him, is not chargeable to the People (*People v Myers*, 171 AD2d 148 [2d Dept 1991]; *Carter*, 91 NY2d 795).
  - **Court congestion delay:** Post-readiness delay due to court congestion is not chargeable to the prosecution, as the prosecution is not the cause of such delay (*Cortes*, 80 NY2d 201).
- o **Applicability of CPL 30.30 (4)'s excludable time provisions:** The prosecution's post-readiness delay will not necessarily be "charged" to the prosecution, as periods of post-readiness delay, just like pre-readiness delay, are subject to the excludable time provisions of CPL 30.30 (4) (*People v Kemp*, 251 AD2d 1072 [4th Dept 1998]).
- o **Exceptional fact or circumstance:** the court is not required to dismiss an indictment due to post-readiness delay (although it may) where the post-readiness delay is occasioned by "some exceptional fact or circumstance, including, but not limited to, the sudden unavailability of evidence material to the prosecution's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period." (CPL 30.30 [3] [b]). Note, there is an incongruence between this subdivision, which, through its use of the permissive term "may," seems to allow a court to dismiss an indictment due to post-readiness delay occasioned by an exceptional fact or circumstance and CPL 30.30 (4) (g), which requires exclusion of delay resulting from an exceptional fact or circumstance.
  - **Unavailability of prosecutor:** An adjournment requested by the prosecutor due to his own personal unavailability for trial is

chargeable to the prosecution where the prosecution fails to show that it would not have been onerous to reassign the case to another prosecutor (*People v DiMeglio*, 294 AD2d 239 [1st Dept 2002]).

## ➤ **PRETRIAL RELEASE**

- **In general:** The defendant is entitled to be released on “just and reasonable bail” or his own recognizance if the prosecution fails to become ready within certain time periods (CPL 30.30 [2]). “Just and reasonable bail” is bail within reach of the defendant (*People ex rel. Chakwin on Behalf of Ford v Warden, N.Y. City Corr. Facility*, 63 NY2d 120 [1984]).
- **Commencement of time period:** time clock generally commences from date defendant is committed to custody of sheriff (CPL 30.30 [2]), though statutory exceptions do exist (CPL 30.30 [5]).
- **Time periods:** The applicable time periods, set forth under subdivision two, are shorter than those that apply under the motion to dismiss provisions of CPL 30.30 (1).
- **Excludable time:** The excludable time provisions of 30.30 (4) apply to a CPL 30.30 (2) motion for pretrial release.

## ➤ **PROCEDURE**

- **Defendant’s burden**
  - **Written motion to dismiss before trial:** To invoke 30.30 rights, the defendant must make a written motion to dismiss, pursuant to CPL 170.30 (1) (e) or 210.20 (1) (g), before trial commences (*People v Woody*, 24 AD3d 1300 [4th Dept 2005]; *People v Lawrence*, 64 NY2d 200 [1984]).
    - **Waiver of objection to oral motion:** The prosecution waives the writing requirement by failing to object at the time of oral motion (*People v Brye*, 233 AD2d 775 [3d Dept 1996]).

- **Timing of motion:** At least with respect to prosecutions in which the highest level offense charged is either a felony or misdemeanor (where the applicable time period is six months, ninety days, or sixty days), CPL 255.20's general requirement that pretrial motions be made within forty-five days after arraignment does not apply to CPL 30.30 motions. This is so because the time period within which the People must be ready extends beyond the forty-five day period.
  
- **Content of papers:** Motion papers must contain "sworn allegations that there has been unexcused delay in excess of the statutory maximum" (*People v Beasley*, 16 NY3d 289, 292 [2011]; *People v Santos*, 68 NY2d 859 [1986]).
  - **Facial sufficiency:** Papers submitted must on their face indicate entitlement to dismissal (*People v Lusby*, 245 AD2d 1110 [4th Dept 1997]).
  
  - **Allegation of lack of readiness:** If the prosecution fails to announce its readiness within the required period, the defendant must allege that fact in his motion papers (*People v Jackson*, 259 AD2d 376 [1st Dept 1999]). If the prosecution announced its readiness, but was not actually ready, the defendant must alleged in motion papers the specific time periods that the prosecution wasn't ready and how the prosecution wasn't ready during the alleged periods (*Jackson*, 259 AD2d at 376).
  
  - **Disputing excludable time:** The defendant's initial burden does not require him to allege that certain periods are not excludable (*Beasley*, 16 NY3d at 292). It is the prosecution's burden to identify the excludable time (*People v Beasley*, 16 NY3d at 292-293; *People v Luperon*, 85 NY2d 71, 81-82 [1995]). Only if the prosecution raises excludable time does the defendant have the obligation to refute that the period is excludable (*Beasley*, 16 NY3d at 292-293; *Luperon*, 85 NY2d at 81-82).

- o **The failure to dispute alleged excludable time:** Defendant’s motion papers must dispute excludable time alleged in the prosecution’s responding papers; otherwise the defendant will be deemed to have conceded that the periods are excludable (*see People v Notholt*, 242 AD2d 251 [1st Dept 1997] [period during which, according to the prosecution’s papers, defendant requested and consented to adjournment, is excludable, despite the failure of prosecutor to supply minutes in support of contention, where the defendant did not deny the prosecution’s contentions]). Therefore, if the alleged excludable time is not disputed in the defendant’s initial papers, it will be necessary for the defendant to dispute the allegations with supplemental sworn allegations (*Beasley*, 16 NY3d at 292-293; *People v Daniels*, 36 AD3d 502 [1st Dept 2007]).
  - **Notice:** Defendant must give the prosecution reasonable notice of motion as required by CPL 210.45 (1) (*People v Woody*, 24 AD3d 1300 [4th Dept 2005]; *People v Mathias*, 227 AD2d 907 [4th Dept 1996]; *see People v Baxter*, 216 AD2d 931 [4th Dept 1995] [motion to dismiss indictment served and made returnable on first day of trial does not to provide reasonable notice]).
- o **Prosecution’s burden**
  - **Demonstrating excludable time:** Once the defendant has alleged an unexcused delay greater than the statutory maximum, the prosecution must demonstrate that there is sufficient excludable time (*People v Berkowitz*, 50 NY2d 333 [1980]). It is incumbent upon the prosecution to “submit” “papers” setting forth the “particular dates [it] claim[s] should be excluded and the *factual* and statutory basis for each exclusion” (*Santos*, 68 NY2d at 861). A determination on whether the prosecution met that burden must rest solely on the motion papers, and accompanying documentary evidence, and the evidence presented at the hearing on the motion, if one is held; a determination -- whether by the trial court or the reviewing

appellate court -- must not be based upon documentary evidence, including the minutes of the proceeding, which were not included as part of the motion papers or introduced at the hearing (CPL 30.30 [1]; CPL 210.20 [1] [g]; CPL 210.45 [1], [2], [3], [4], [5], [6]; *see also People v Contrearras*, 227 AD2d 907 [4th Dept 1996] [it is documentary proof “submitted” to the lower court that is to be considered in determining whether a period is to be excluded for 30.30 purposes]).

- **The prosecution’s failure to meet its burden:** Where the prosecution fails to meet this burden, the defendant’s motion to dismiss must be granted summarily, i.e., without a hearing (*Santos*, 68 NY2d 859).
  - **Concession of allegations:** The prosecution will be deemed to have conceded what it does not deny in its answering affirmation (*Berkowitz*, 50 NY2d 333).
- **Hearing:** Where the motion papers raise a factual dispute (for example, as to when the accusatory was filed, whether the prosecution announced ready within the designated period, whether the prosecution was in fact ready within the prescribed period, or whether a certain period is excludable) a hearing is necessary so long as the dispute is dispositive of the motion (*Sydlar*, 106 AD3d at 1370; *People v Smith*, 245 AD2d 534 [2d Dept 1997]).
  - **Hearing not required:** A hearing will not be necessary where the issue in dispute can be resolved by “unquestionable documentary proof” submitted with the motion papers (*see People v Allard*, 113 AD3d 624, 626-627 [2d Dept 2014] [the prosecution can defeat a 30.30 claim without a hearing when it can demonstrate with “unquestionable documentary proof” that the claim has no merit]).
    - **Example:** A transcript or a letter of the defense counsel showing that the defendant consented to an adjournment may be “unquestionable documentary proof” of such consent (*People v Matteson*, 166 AD3d 1300, 1302 [3d Dept 2018]).



- o **Guilty plea:** A defendant forfeits his 30.30 rights by pleading guilty, even if the court has advised him that his 30.30 rights will be reviewable (*People v Attanasio*, 240 AD2d 877 [3d Dept 1997]).
  - **Voluntariness of guilty plea:** Incorrect advice that the 30.30 claim is reviewable despite the guilty plea may render the guilty plea involuntary (*People v Thomas*, 53 NY2d 338, 344 [1981]).
  - **Ineffective Assistance of Counsel:** A guilty plea will not preclude the defendant from claiming that his counsel’s failure to make a meritorious CPL 30.30 motion deprived him effective assistance (*People v Devino*, 110 AD3d 1146).
  
- o **Preservation for appeal:** A defendant on appeal may raise only those 30.30 contentions that he argued in the lower court in his or her initial motion papers, reply papers, or at the hearing *or* those which the lower court addressed in its decision (*People v Allard*, 28 NY3d 41, 46-47 [2016]; *People v Goode*, 87 NY2d 1045 [1996]). The appellate court can agree with the defendant that certain periods are not excludable only if the defendant, in the lower court, argued with specificity that the periods were not excludable or the lower court expressly addressed the excludability of those period upon the defendant’s motion. For example, if a defendant argued that from January to July is not excludable because the prosecution’s delay in responding to the omnibus motion was “unreasonable,” the appellate court will consider only whether that entire period was not excludable. It will not consider, for example, the alternative argument that the shorter period from May to July was not excludable because that particular delay was unreasonable (*Beasley*, 16 NY3d 289). If the prosecution contends in its answering papers that a specific period is excludable, the defendant will have preserved his or her argument that the period is not excludable only to the extent that the prosecution’s particular arguments were addressed in the defendant’s original motion or reply papers (*Allard*, 28 NY3d at 46-47; *People v Rosa*, 164 AD3d 1182, 1183 [1st Dept 2018]; *People v Cox*, 161 AD3d 1100, 1100-1101 [2d Dept 2018]; *People v Henderson*, 120 AD3d 1258 [2d Dept 2014]).
  - **Decision required:** The defendant’s 30.30 claim will be preserved only if the court expressly decides the 30.30 motion (CPL 470.05 [2]; *People v Green*, 19 AD3d 1075 [4th Dept 2005]).

- o **Reviewable grounds for affirmance:** An appellate court may affirm a CPL 30.30 ruling only on those grounds that were the basis for the trial court's determination (*People v Concepcion*, 17 NY3d 192 [2011]).
- o **Ineffective Assistance of Counsel:** Where defense counsel has failed to make a meritorious 30.30 motion for dismissal, the defendant will be denied effective assistance of counsel (*People v Devino*, 110 AD3d 1146 [3d Dept 2013]; *People v Sweet*, 79 AD3d 1772 [4th Dept 2010]; *People v Manning*, 52 AD3d 1295 [4th Dept 2008]; *People v Grey*, 257 AD2d 685 [3d Dept 1999]; *People v Miller*, 142 AD2d 970 [4th Dept 1988]).
  - **Merit Requirement:** It has been held that there will be no IAC claim where the record is unclear that the 30.30 claim that counsel failed to pursue actually had merit (*see People v Younges*, 101 AD3d 1589 [4th Dept 2012]; *People v Brunner*, 16 NY3d 820 [2011] [counsel's failure to make a 30.30 motion did not deny defendant effective assistance counsel where there was negative precedent and applicability of exclusions was debatable]; *but see People v Clermont*, 22 NY3d at 934 [court found counsel ineffective for not vigorously pursuing suppression claim, noting that it was not necessary for the court to resolve whether the motion to suppress actually had merit; it was enough that substantial arguments for and against suppression could be made and the question, which involved "complex *DeBour* jurisprudence," was a close one]).